

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

RISING GROUND)	
)	
)	
Employer,)	
)	
and)	Case No. 02-RC-264192
)	
WAREHOUSE PRODUCTION SALES)	
AND ALLIED SERVICE EMPLOYEES)	
UNION LOCAL 811 AFL-CIO)	
)	
Petitioner.)	
)	

**EMPLOYER’S REQUEST FOR REVIEW OF REGIONAL DIRECTOR’S ORDER
DIRECTING MAIL BALLOT ELECTION**

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Rising Ground (“Employer”) files this Request for Review, pursuant to Section 102.67(c) and (d) of the National Labor Relation Board’s (“NLRB” or “Board”) Rules and Regulations, of the Regional Director’s Order Directing Mail Ballot Election dated August 26, 2020 (Exhibit 1 or “Order”). Mail ballots are scheduled for distribution on September 8, 2020. Rising Ground is concurrently filing an Emergency Motion to Stay the Election. While Rising Ground respects the Regional Director’s preference not to hold manual elections and acknowledges the seriousness of the COVID-19 pandemic, his Order fails to cite sufficient, objective rationale *in this case* for overcoming the Board’s long-held presumption in favor of manual elections. Here, local conditions and infection rates, available safety precautions, and proposed bargaining unit size outweigh generalized concerns over COVID-19 and/or the administrative convenience of mail ballots. The Board should intervene, grant review, and reverse the Regional Director’s Order.

I. BACKGROUND

On August 6, 2020, the Petitioner, Warehouse Production Sales and Allied Service Employees Union Local 811 AFL-CIO (the “Union”), filed a representation petition for a small unit of direct support professionals employed at 1035 East 233rd Street, Bronx, NY. On August 18, 2020, the Regional Director approved a Stipulated Election Agreement, but left open the issue of a manual versus mail election *despite* both the Employer and Union finding a manual election appropriate. The parties were informed prior to entering the Stipulated Election Agreement that Region 2 had yet to conduct any manual elections since the COVID-19 pandemic hit in March 2020 and would need to consider the election format here.

Rising Ground submitted a statement of position on the election format on August 21, 2020, *see* Exhibit 2, which argued that a manual election should occur based on the Board’s

presumption in favor of this format, local conditions involving the COVID-19 virus, and the potential for even minor disenfranchisement to impact the vote outcome. Rising Ground further explained protocols for a safe election among the 10 potential voters. The Employer proposed/stated the following in part:

- An outdoor election with no more than one voter present at any given time. The address is a residential program with an accessible lawn and sizeable outside patio. The patio is 30 feet by 25 feet (750 square feet). The Employer would provide a table(s), chair(s), and tent or canopy for the comfort of the voters, observers and board agent.
- Full compliance with all safety guidelines in Memorandum GC 20-10, as well as additional protocols and protections, to include:
 - The release the employee voters *one at a time* to ensure that only one voter would be present in the voting area.
 - The parties would each have an observer and the Board Agent would be the fourth person in the area – all of whom, along with voters, could remain at a safe physical distance from each other and wear masks throughout the election. For example, each person would have at least six feet of distance between them and the next person and the Employer would provide markings to show the appropriate distance.
 - The Employer also would construct plexiglass dividers for each station. The Employer has experience in creating these kinds of barriers.
 - The Employer also would provide necessary supplies such as tape, eraser-less pencils, masks, gloves, sanitizer and wipes.
 - Voters would be able to enter the voting area one at a time, vote, and then exit without having to retrace their steps. Signage and/or ground markings would direct the voters' flow of traffic.
- No history of recent COVID-19 infections among this small workforce or the facility's residents (which has remained operational throughout the pandemic), and the Employer's robust cleanings and protocols for employees and residents (daily certifications, resident temperature checks, etc.).
- Local area's extremely low infection rates over the past several months (only 300 new cases per day) in a city (New York City) home to approximately 8 million residents. Governor Andrew Cuomo has announced that New York State COVID-19 daily positive tests, and infection rate of tests taken, have reached record and sustained lows.¹ New York State also has deployed some of the nation's most aggressive interstate travel restrictions and other restrictions on

¹ <https://www.governor.ny.gov/news/governor-cuomo-announces-covid-19-hospitalizations-and-intubations-drop-new-lows>

residents, thereby minimizing the source or growth of new possible infections as compared to other jurisdictions.

- Although the Union did not file a statement of position, based on prior representations (after filing the election petition itself), the Union has not opposed a manual election.

On August 26, 2020, the Regional Director issued his Order Directing Mail Ballot Election despite the Employer's statement of position summarized above. The Regional Director's reasoning – beyond boilerplate background on COVID-19 and the pandemic – included:

- The Employer did not propose to conduct COVID-19 testing procedures for its staff, or the small number of residents who live at the facility.
- There may be inclement weather that could make the outdoor area “unusable” in his view, presumptively because the provided tents or canopies may not keep the voters or other attendees completely dry during the election.
- The Employer did not state how long it would take employees to vote, released one-by-one, among 10 potential voters.
- During the election, it is likely that someone will come within six feet of another person.
- Memorandum GC 20-10 is deficient because it contains no enforcement mechanisms for self-certifications, and under this protocol a hypothetical infection and/or illness could delay the manual election, thereby leading to a process “fraught with uncertainty and subject to unpredictable changes.”
- Because COVID-19 is transmitted from person-to-person, an in-person election here “poses a significant and unnecessary risk[] to the health and safety of Board agents, party representatives, voters, observers, and the public.”
- “The Board’s mail-ballot process all but eliminates the inherent safety risks and equally ensures that employees can conveniently and freely exercise their rights to vote or refrain from voting in secret,” and otherwise “maximize[s] participation.”

II. ARGUMENT

A. Standard of Review.

Under Section 102.67(d) of the Board's Rules and Regulations, a request for review may be granted upon one or more of the following grounds:

- (1) That a substantial question of law or policy is raised because of:

- (i) The absence of; or
 - (ii) A departure from, officially reported Board precedent.
- (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
 - (3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
 - (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 C.F.R. 102.67(d). At least one, if not all, of these grounds are satisfied here. Rising Ground also notes the Board recently granted review and stayed a mail ballot election in *Aspirus Keweenaw*, Case No. 18-RC-263185 (Aug. 25, 2020). The Board's rationale for granting review and staying the mail ballot election in that case may apply, if not more so, to this case.

B. The Regional Director Departed from Reported Board Precedent.

The Regional Director departed from established Board law and policy by ordering a mail election without (1) sufficient regard for the Board's clear preference for manual elections and (b) sufficient, objective reasons tied to the specifics facts in this case, rather than generalized COVID-19 concerns that could apply *indefinitely* and regardless of the circumstances. It is beyond debate that the Board prefers, indeed strongly prefers, manual elections absent some extraordinary circumstance that makes a manual election infeasible. *Nouveau Elevator Indus., Inc.*, 326 NLRB 470, 471 (1998); *see also San Diego Gas & Elec.*, 325 NLRB 1143, 1144 (1998) (noting "the value of having a Board agent present at the election"); *Thompson Roofing, Inc.*, 291 NLRB 743, 743 n.1 (1988) (observing that "mail ballot elections are more vulnerable to the destruction of laboratory conditions than are manual elections because of the absence of direct Board supervision over the employees' voting"). None of the situations that normally warrant ordering a mail ballot election – i.e., situations where eligible voters are "scattered"

because of their job duties, work schedules, or otherwise involved in a strike, a lockout, or active picketing – is present here. *See San Diego Gas & Elec.*, 325 NLRB at 1145.

Certainly the COVID-pandemic has been, *in general*, an extraordinary event impacting the United States and the world, and it has in some cases reasonably led the NLRB to hold mail ballot elections since March 2020. But that does not mean COVID-19 – especially almost six months after the pandemic began and numerous changes to mitigate the virus – presents an “extraordinary circumstance” in every representation case filed at the regional offices. The Regional Director erred by relying on generalized (and at times outdated) references to potential for virus exposure without due consideration for local conditions and safety precautions. This alone warrants Board review. Indeed, under the Regional Director’s rationale, there will be no manual elections in Region 2, including *outdoor* elections, until COVID-19 has all but disappeared or there exists a widespread, highly-effective vaccine. These scenarios that may never come to pass.

C. The Regional Director’s Order is Clearly Erroneous and Prejudicial to the Parties.

The specific rationale for the Regional Director’s Order includes factually erroneous, or at least unsupported, conclusions that the Board should reject on review.

- *The Employer did not propose to conduct COVID-19 testing procedures for its staff, or the small number of “residents” who live at the facility.*

It is unclear what this means. Is the Regional Director saying that in order for a manual election to occur, an employer must have onsite rapid testing available, and that anyone refusing to take the immediate test and/or who fails the test cannot vote? Is the Regional Director saying that the absence of reported infections cannot be considered valid absent some robust employer mandate to regularly test all employees? The Board should find this reasoning erroneous and prejudicial to both employers and unions.

- *There may be inclement weather that could make the area “unusable”, presumptively because the provided tents or canopies may not keep the voters or other attendees completely dry during the election.*

The chance for rain on election day is not a legitimate basis to reject an outdoor manual election that would further reduce the already limited risk of potential virus transmission. Had the employer proposed an indoor voting location, presumably the Regional Director would have cited the increased risk of COVID-19 transmission indoors versus outdoors. And as for the outdoor location here, in the patio area next to the facility, the Employer has proposed canopies/tents to cover any needed tables and chairs, and if a “dry” area is needed the Board agent or anyone else can access a large indoor space free of other persons and with appropriate social distancing and precautions.

- *The Employer did not state how long it would take employees to vote, released one-by-one, among 10 potential voters.*

Presumably this issue can easily be resolved through discussion, or the Region’s experience in timely processing voters. Here, with up-to 10 eligible voters and two proposed voting periods based on shift schedules, it would seem eminently acceptable to have a one-hour period for all eligible voters to vote on back-to-back days. Not having the voting period length defined, in the statement of position, is not a legitimate reason to reject a manual election, especially under the circumstances with a small proposed bargaining unit and the ability to extrapolate and order a reasonable voting period.

- *During a manual election, it is likely someone will come within six feet of another person and be exposed to COVID-19.*

This concern is entirely speculative. With masks, social distancing, PPE, and other measures (as summarized in the Employer’s position statement and in compliance with Memorandum GC 20-10), the mere possibility that someone comes within six feet of another person during an election held outdoors, one person is infected, and that infection spreads to the

second person, is a hypothetical scenario that falls short of an “extraordinary circumstance” to mandate mail ballots. This conclusory analysis presents yet another example of how the Regional Director has failed to sufficiently justify his decision based on the case facts.

- *Memorandum GC 20-10 is deficient because it contains no enforcement mechanisms for self-certifications, and under this protocols a hypothetical infection and/or illness could delay the manual election, leading to a process “fraught with uncertainty and subject to unpredictable changes.”*

The same response to the above bullet applies here. Speculation on top of speculation. Perhaps in a much larger proposed bargaining unit, this concern could have some validity, but in a small unit the rationale is erroneous and prejudicial.

- *Because COVID-19 is transmitted from person-to-person, an in-person election “poses a significant and unnecessary risk[] to the health and safety of Board agents, party representatives, voters, observers, and the public.”*

Again, the Employer understands that COVID-19 is a serious illness, and it understands that mail ballots may be prudent in certain cases. But it cannot be that the mere existence of COVID-19 in the United States, and the possibility of infection no matter how small, is alone enough to order a mail ballot election. If that were the case, then any level of risk associated with persons leaving their home, including transportation accidents, personal injuries, violent crime, catching other diseases or illnesses, or other potential risks would automatically support a mail ballot election, and correspondingly the Board would rarely if ever hold manual elections as a matter of policy. But the Board has yet to make that policy judgement.

- *Finally, the Regional Director reasoned that “the Board’s mail-ballot process all but eliminates the inherent safety risks and equally ensures that employees can conveniently and freely exercise their rights to vote or refrain from voting in secret,” and otherwise “maximize[s] participation.”*

Mail ballot elections have the real prospect of disenfranchising voters, either based on the lack of ballot receipt, failure to timely respond, USPS delivery issues, or *void votes* (for example, based on not signing/sealing the envelop correctly). In this case, one confused voter, or one void

vote, out of 10 potential eligible voters, can impact the election outcome.² And rather than know the election results right away, the ballots here will not be counted until at least October 6-13, 2020 on a virtual platform. This approach unnecessarily delays the election results, which undermines the Regional's Director rationale that a manual election is more likely to cause delay.

D. The Board Has Compelling Reasons to Weigh In on the Issue of When/How Manual Elections Should Resume in the United States.

Finally, the Board's recent decision to grant the request for review and stay the election in the *Aspirus* case signals the need for a national, uniform approach and set of standards for resuming at least some manual elections. Rising Ground and the Union should be the beneficiary of a common, reasoned framework, rather than an administrative preference to indefinitely suspend manual elections without due regard for the specific facts or safety protocols at issue.

III. CONCLUSION

For these reasons, the Board should grant Rising Ground's Request for Review of the Regional Director's Order.

Dated: August 31, 2020

Respectfully submitted,



² Rising Ground would ask that the Board consider a statistical review (or update an existing review) of mail election results since March 2020 to compare them with manual elections to assess whether there has been any material change (1) in voter participation levels and (2) void or unaccepted votes based on procedural errors or untimely receipt of mail ballots. This analysis could reinforce the basis for review and undermine the Regional Director's view that mail ballots maximize participation and are just as effective as manual elections.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the Employer's Request for Review of the Regional Director's Order Directing Mail Ballot Election was filed today, August 31, 2020, using the NLRB's e-Filing system and was served by email upon the following:

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